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12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 BROADCAST MUSIC, INC. et al, )

15 Plaintiffs, )

16 v. )

17 PURE COUNTRY DANCEHALL & SALOON, )  
18 INC. d/b/a PURE COUNTRY DANCEHALL & )  
19 SALOON and CATHI WOODS, )  
20 individually, )

21 Defendants. )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

Case No.3:06-CV-00374-ECR-RAM

29 PLAINTIFFS' MEMORANDUM IN SUPPORT  
30 OF MOTION FOR SUMMARY JUDGMENT

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## I. PRELIMINARY STATEMENT

8 This is an action for copyright infringement brought pursuant  
9 to 17 U.S.C. Sec. 101 et seq. (the "Copyright Act"). Jurisdiction  
10 is vested in this Court under 28 U.S.C. Sec. 1338(a) and venue is  
11 proper under 28 U.S.C. Sec. 1400(a).

## II. BACKGROUND

12 Plaintiff Broadcast Music, Inc. ("BMI"), is a "performing  
13 rights society" which licenses the right to publicly perform  
14 copyrighted musical works on behalf of the copyright owners of  
15 these works. 17 U.S.C. § 101. The other Plaintiffs are the  
16 copyright owners of various compositions which are the subject of  
17 this lawsuit. See Affidavit of BMI Assistant Vice President,  
18 Legal John Coletta ("Coletta Affidavit") at paragraph 4, attached  
19 hereto as Exhibit A. Under the Copyright Act, the owners of  
20 copyrights in musical compositions possess the exclusive right to  
21 authorize public performances of their works. 17 U.S.C. Sec.  
22 106(4).

23 Through agreements with copyright owners such as music  
24 publishing companies and independent composers, BMI acquires non-  
25 exclusive public performance rights. Coletta Affidavit at  
26 paragraph 2. BMI has acquired such rights from each of the other  
27 Plaintiffs in this action. BMI, in turn, grants to music users  
28 such as broadcasters and the owners and operators of concert  
halls, restaurants, nightclubs and hotels, the right to publicly  
perform any of the works in BMI's repertoire by means of "blanket  
license agreements." Coletta Affidavit at paragraph 2. These

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1 agreements have been recognized as the most practical means to  
2 exploit copyright owners' public performance rights. See  
3 Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441  
4 U.S. 1 (1979); Broadcast Music, Inc. v. Moor-Law, Inc., 484 F.  
5 Supp. 357 (D. Del. 1980), 527 F. Supp. 758 (D. Del. 1981), aff'd  
6 without op., 691 F. 2d 490 (3d Cir. 1982).

7 BMI operates as a non profit-making music performing rights  
8 organization. It distributes all of the money it collects in  
9 license fees from music users as royalties to its affiliated  
10 publishers and composers, after the deduction of operating  
11 expenses and reasonable reserves. Coletta Affidavit at paragraph  
12 3.

### 13 III. STATEMENT OF UNDISPUTED FACTS

14 1. The Defendants Pure Country Dancehall & Saloon, Inc. and  
15 Cathi Woods own and operate Pure Country Dancehall & Saloon  
16 located at 1955 Oddie Boulevard, Sparks, NV 89431, which regularly  
17 features performances of live and recorded music. See Deposition  
18 Transcript of Defendant Cathi Woods, dated March 20, 2007 (the  
19 "Woods Deposition"), at page 31 lines 1-6, attached hereto as  
20 Exhibit B.

21 2. Between June 6, 2003, and May 26, 2006, BMI repeatedly  
22 informed the Defendants of the need to obtain permission for  
23 public performances of copyrighted music. BMI offered to enter  
24 into a license agreement with the Defendants, but the Defendants  
25 failed to enter into a license agreement. Affidavit of Lawrence  
26

1 E. Stevens ("Stevens Affidavit") at Paragraphs 2-3, attached  
2 hereto as Exhibit C. Woods Deposition at pp 43-84, 87-89.

3 3. On May 19, 2004, BMI instructed the Defendants to cease  
4 public performances of music licensed by BMI. Stevens Affidavit  
5 at Paragraphs 2-3. Nevertheless, public performances of BMI-  
6 licensed music continued at Pure Country Dancehall & Saloon after  
7 that date and performances of songs owned by the Plaintiffs were  
8 noted by a BMI investigator on March 29, 2006, and April 1, 2006.  
9 Stevens Affidavit at Paragraphs 5-6. Woods Deposition at pp 64-  
10 66.

11 4. The Plaintiffs commenced this action for copyright  
12 infringement on July 7, 2006. The Defendants' Answer was served  
13 on or about August 25, 2006. The Plaintiffs' First Request for  
14 Admissions was served on November 7, 2006. The Defendants  
15 responded on December 17, 2006, to Plaintiffs' Request for  
16 Admissions. A copy of those requests along with Defendants'  
17 Answers is attached as Exhibit B to the Affidavit of Michael Knox.

18 5. On March 20, 2007, defendant Cathi Woods was deposed.

19 Plaintiffs bring this Motion for Summary Judgment under  
20 Fed.R.Civ.P. 56. As demonstrated below, there are no issues of  
21 fact remaining in this action. Accordingly, Plaintiffs are  
22 entitled to judgment as a matter of law.

23 **IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT**

24 The standard for summary judgment is set for in Rule 56(c)  
25 of the Federal Rules of Civil Procedure which states that summary  
26

1 judgment "shall be rendered forthwith if the pleadings,  
2 depositions, answers to interrogatories, and admissions on file,  
3 together with the affidavits, if any, show that there is no  
4 genuine issue as to any material fact and that the moving party  
5 is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c)  
6 (emphasis added). This standard "provides that the mere existence  
7 of some alleged factual dispute between the parties will not  
8 defeat an otherwise properly supported motion for summary  
9 judgment; the requirement is that there be no genuine issue of  
10 material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
11 247-248 (1986) (emphasis added). Moreover, "when a motion for  
12 summary judgment is made and supported as provided in this rule,  
13 an adverse party may not rest upon mere allegations or denials  
14 ... but the adverse party's response ... must set forth specific  
15 facts showing that there is a genuine issue for trial."  
16 Fed.R.Civ.P. 56(e).

17  
18 **A. There Are No Genuine Issues Of Material Fact**

19  
20 The Copyright Act provides the owner of a copyright with the  
21 exclusive right to perform, or to authorize others to perform, the  
22 copyrighted work. 17 U.S.C. Sec. 106(4). Any person who violates  
23 this exclusive right is an infringer. 17 U.S.C. Sec. 501(a). In  
24 an action for infringement, the copyright owner may seek statutory  
25 damages, 17 U.S.C. Sec. 504(c), injunctive relief, 17 U.S.C. Sec.  
26

1 502, and attorney's fees and costs, 17 U.S.C. Sec. 505.

2 In order to prevail in an action for copyright infringement,  
3 the Plaintiffs must establish the following five elements:

- 4 1. Originality and authorship of the copyrighted works  
5 involved;  
6 2. Compliance with the formalities of the Copyright Act;  
7 3. Proprietary rights in the copyrighted works involved;  
8 4. Public performance of the compositions involved; and  
9 5. Lack of authorization for public performance.

10 Broadcast Music, Inc. v. Pine Belt Inv. Developers, Inc., 657 F.  
11 Supp. 1016, 1020 (S.D. Miss. 1987); Sailor Music v. Mai Kai of  
12 Concord, Inc., 640 F. Supp. 629, 632 (D.N.H. 1986); Milene Music  
13 v. Gotauco, 551 F. Supp. 1288, 1292 (D.R.I. 1982); Boz Scaggs  
14 Music v. KND Corp., 491 F. Supp. 908, 912 (D. Conn. 1980).

15 The first three elements are established in the Coletta  
16 Affidavit which constitutes sufficient evidence of the facts sworn  
17 to therein. 28 U.S.C. § 1746. His Affidavit, referring to the  
18 Schedule of the Complaint, sets forth the names of the authors and  
19 publishers of each composition, the date of copyright registration  
20 and the registration number. The Affidavit is supplemented with  
21 copies of each registration certificate. Cathi Woods has admitted  
22 that she has no evidence to rebut the Plaintiffs' proof on these  
23 three points. Woods Deposition at page 115 lines 17-19.

24 The fourth element, public performance, is established  
25 through the Certified Infringement Reports of Christopher K.

1 Pisano who was hired by BMI for the purpose of visiting the  
2 establishment and making written reports of musical compositions  
3 which were performed. Mr. Pisano's certified reports are attached  
4 to the Stevens Affidavit, as discussed below. Performance of the  
5 music may also be established by Affidavit. 28 U.S.C. § 1746; see  
6 also Pine Belt Inv. Developers, Inc., 667 F. Supp. at 1020; Sailor  
7 Music 640 F. Supp. at 629. In her deposition, defendant, Cathi  
8 Woods admitted, contrary to denials in Defendants' Answers to  
9 BMI's Request For Admissions, that she has no evidence that the  
10 BMI-licensed compositions listed on the Schedule were not  
11 performed on the dates and times referenced. Woods Deposition at  
12 page 104 lines 7-25; page 105 lines 1-20; page 106 lines 1-25;  
13 page 107 lines 1-25; page 108 lines 1-25; page 109 lines 1-25;  
14 page 110 lines 1-25; page 111 lines 1-25; page 112 lines 1-25;  
15 page 113 lines 1-6; page 116 lines 9-13; page 127 lines 8-14.

16 The fifth element is similarly established in the Stevens  
17 Affidavit. It states that the Defendants did not enter into a BMI  
18 license agreement nor were the performances otherwise authorized.  
19 Moreover, Defendants continued to publicly perform copyrighted  
20 music without permission after being instructed to cease, as  
21 indicated by the Certified Infringement Reports. Cathi Woods  
22 admitted that they were not licensed by BMI on March 29, 2006, and  
23 on April 1, 2006. See Woods Deposition at page 119 lines 18-24.  
24 The Defendants admit that they have no evidence controverting that  
25 they received correspondence from BMI, including the overnight  
26

1 letter which instructed them to cease unauthorized performances of  
 2 BMI-licensed music in their Answers to Plaintiffs' Request For  
 3 Admissions, numbers 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 47,  
 4 48, 49, 50, 51, 52 and 53.

5  
 6 B. The Defendants Are Vicariously Liable for Acts of  
 7 Infringement Committed at Pure Country Dancehall &  
 8 Saloon

9 17 U.S.C. Sec. 501(a) provides that "[a]nyone who violates  
 10 any of the exclusive rights of the copyright owner as provided by  
 11 Sections 106 through 121 . . . is an infringer of the copyright .  
 12 . . ." Interpreting the equivalent section under the Copyright Act  
 13 of 1909, the Second Circuit Court of Appeals stated: "Although the  
 14 Act does not specifically delineate what kind or degree of  
 15 participation in an infringement is actionable, it has long been  
 16 held that one may be liable for copyright infringement even though  
 17 he has not himself performed the protected composition." Gershwin  
 18 Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F. 2d 1159,  
 19 1161-62 (2d Cir. 1971).

20 In an earlier Second Circuit case, the Court stated:

21 [T]he cases are legion which hold the dance hall  
 22 proprietor liable for the infringement of copyright  
 23 resulting from the performance of a musical composition  
 24 by a band or orchestra whose activities provide the  
 25 proprietor with a source of customers and enhanced  
 income. He is liable whether the band leader is  
 considered, as a technical matter, an employee, or an  
 independent contractor and whether or not the  
 proprietor has knowledge of the compositions to be  
 played or any control over their selection.

26 Shapiro, Bernstein & Co., Inc. v. H.L. Green Co., Inc., 316 F. 2d

1 304, 307 (2d Cir. 1963); Broadcast Music, Inc. v. The Peppermint  
 2 Club, Inc., 229 U.S.P.Q. 534, 537-38 (N.D. Ohio 1986).

3 The corporate defendant, Pure Country Dancehall & Saloon,  
 4 Inc. is responsible for the tortious actions of its employees  
 5 under the doctrine of respondeat superior. Wihtol v. Crow, 309  
 6 F.2d 777, 782-783 (8th Cir. 1962); M. Witmark & Sons v. Calloway,  
 7 22 F.2d 412, 414 (D.Tenn. 1927). See generally F. Harper, F.  
 8 James & O. Gray, The Law of Torts, §26.3 (2d ed. 1986). See also  
 9 Nimmer on Copyright, §12.04[A].

10 Not only is Pure Country Dancehall & Saloon, Inc. liable for  
 11 infringements occurring at Pure Country Dancehall & Saloon, but  
 12 Cathi Woods is individually liable. "A corporate officer is  
 13 jointly and severally liable, with his corporation for copyright  
 14 infringement if he (1) 'had the right and ability to supervise the  
 15 infringing activity', and (2) 'has a direct financial interest in  
 16 such activities'." The Peppermint Club, Inc., 229 U.S.P.Q. at  
 17 538, (quoting Warner Bros., Inc. v. Lobster Pot, Inc., 582 F.  
 18 Supp. 478, 483 (N.D. Ohio 1984)). See also Nick-O-Val Music Co. v.  
 19 P.O.S. Radio, Inc., 656 F. Supp. 826, 828 (M.D. Fla. 1987); Milene  
 20 Music, Inc. 551 F. Supp. at 1295; Boz Scaggs Music 491 F. Supp. at  
 21 913-14.

22 The Defendants have admitted that they operated and  
 23 maintained Pure Country Dancehall & Saloon and that they have a  
 24 direct financial interest in the establishment and in their Answer  
 25 to the Plaintiffs' Request for Admissions, numbers 1, 2, 3, 4, 5,  
 26

6, 7, 8, 13 and 14. Additionally, Cathi Woods has admitted that she has the right and ability to control the activities of Pure Country Dancehall & Saloon. Answer to Plaintiffs' Request for Admissions, numbers 11 and 12. Woods Deposition page 100 lines 10-14; page 101 line 25; page 102 lines 1-12. See Pine Belt Inv. Developers, Inc., 667 F. Supp. at 1018.

#### V. PLAINTIFFS ARE ENTITLED TO THE RELIEF THEY REQUEST

Plaintiffs request permanent injunctive relief, statutory damages for each of the claims of infringement, costs and reasonable attorney's fees. Each aspect of the requested relief is briefly discussed below.

##### A. Injunctive Relief

17 U.S.C. Sec. 502(a) provides that the Court may grant final injunctions "to prevent or restrain infringement of a copyright."

As one court has stated:

A permanent injunction is especially appropriate where a threat of continuing infringement exists . . . The threat of continuing infringement is substantial in the present case. Niro's provided unauthorized performances of copyrighted musical compositions on its premises after receiving oral and written notices of infringement and demands to stop such infringement from BMI. This behavior indicates a willful disregard of copyrights held by BMI and should be permanently enjoined.

Broadcast Music, Inc. v. Niro's Palace, Inc., 619 F. Supp. 958, 963 (N.D. Ill. 1985).

Even where Defendants have secured licenses after the time of the infringements, injunctive relief is warranted. In Milene

1 Music, the Defendants were licensed by the time the court  
2 considered the Plaintiffs' Motion for Summary Judgment. The Court  
3 granted injunctive relief stating that "[t]he history of  
4 defendants' actions . . . exhibits an unfortunate tendency  
5 conveniently to ignore, from time to time, . . . the plaintiffs'  
6 proprietary rights." 551 F. Supp. at 1295-1296. See also Sailor  
7 Music 640 F. Supp. at 634-35.

8 In this instance where the Defendants are as yet unlicensed  
9 and continue to offer unauthorized performances of the Plaintiffs'  
10 music, broad injunctive relief is appropriate and necessary.

11 **B. Statutory Damages**

12 The Copyright Act empowers a plaintiff to elect to receive an  
13 award of statutory damages "in a sum of not less than \$750 or more  
14 than \$30,000" per infringement in lieu of an award representing  
15 the Plaintiffs' actual damages and the Defendants' profits. 17  
16 U.S.C. Sec. 504(c)(1). Furthermore, "[i]n a case where the  
17 copyright owner sustains the burden of proving . . . that  
18 infringement was committed willfully, the court in its discretion  
19 may increase the award of statutory damages to a sum of not more  
20 than \$150,000." 17 U.S.C. Sec. 504(c)(2). Within these statutory  
21 limits, the assessment of damages is at the discretion of the  
22 court. See F.W. Woolworth Co. v. Contemporary Arts, Inc., 344  
23 U.S. 228, 231-32 (1952). Statutory damages are "designed to  
24 discourage wrongful conduct . . . and vindicate the statutory  
25 policy." Id. at 233. "The court's award should be designed to

1 compensate plaintiffs as well as to punish defendant[s]." Prater  
2 Music v. Williams, 5 U.S.P.Q.2d 1813, 1816 (W.D. Mo. 1987).

3 According to the Stevens Affidavit, when BMI first contacted  
4 the Defendants in 2003, they were asked to execute a license  
5 agreement. To date, BMI has not received a license agreement or  
6 any license fees from the Defendants. The amount awarded in  
7 statutory damages should significantly exceed the amount of unpaid  
8 license fees. As the court in Prater Music held: "If the  
9 copyright laws are to have any effect, a judgment against [a]  
10 defendant must be appreciably more than the amount he would have  
11 had to expend to obtain permission." 5 U.S.P.Q. at 1816. Music  
12 users such as the Defendants should be "put on notice that it  
13 costs less to obey the copyright laws than to violate them."  
14 Rodgers v. Eighty Four Lumber Co., 623 F. Supp. 889, 892 (W.D. Pa.  
15 1985), quoting Music City Music v. Alfa Foods Ltd., 616 F. Supp.  
16 1001, 1003 (E.D. Va. 1985). See also Broadcast Music, Inc. v.  
17 Triple L Vending, Inc., 5 U.S.P.Q.2d. 1346, 1349 (W.D. Tex. 1987);  
18 Halnat Pub. Co. v. L.A.P.A., Inc., 669 F. Supp. 933 (D. Minn.  
19 1987). Musical performances are obviously important to the  
20 operation of Pure Country Dancehall & Saloon. "If music did not  
21 pay, it would be given up." Herbert v. The Shanley Co., 242 U.S.  
22 591, 595 (1917). Woods Deposition at page 81 lines 4-19  
23 (admitting that music is played at Pure Country Dancehall and  
24 Saloon to attract customers and increase revenue).

1           The court, in its discretion, may also augment the amount of  
 2       statutory damages awarded to reflect the degree of culpability  
 3       exhibited by the Defendants. See Wow & Flutter Music v. Len's Tom  
 4       Jones Tavern, Inc., 606 F. Supp. 554, 555-57 (W.D.N.Y. 1985).  
 5       "Where a defendant continues to infringe upon copyrights despite  
 6       repeated warnings, courts have found defendant's conduct to be  
 7       willful." Prater Music 5 U.S.P.Q.2d at 1815; accord Int'l Korwin  
 8       Corp. v. Kowalczyk, 855 F. 2d. 375 (7th Cir. 1988); Nick-O-Val  
 9       Music Co., Inc., 656 F. Supp. at 829; Rodgers, 623 F. Supp. at  
 10      892.

11           The record supports a finding that the Defendants  
 12      deliberately violated the Plaintiffs' rights. According to the  
 13      Stevens Affidavit, between June 6, 2003, and May 26, 2006, BMI  
 14      sent twenty (20) letters to the Defendants advising them of the  
 15      need to enter into a license agreement. A BMI representative also  
 16      telephoned Pure Country Dancehall & Saloon on twenty-nine (29)  
 17      occasions. A BMI representative was able to speak to Cathi Woods  
 18      and her attorney Michael Morrison. Woods Deposition at page 48  
 19      lines 20-21; page 55 lines 18-23. On May 19, 2004, BMI sent Cathi  
 20      Woods an overnight letter informing her that she must immediately  
 21      cease unauthorized performances of BMI-licensed music. This  
 22      letter was returned to the BMI office as refused. Stevens  
 23      Affidavit at paragraph 2. The letter was resent to Cathi Woods on  
 24      June 7, 2004, via First Class Mail. Despite this, a BMI  
 25      investigator noted the performance of twenty (20) BMI-licensed  
 26

1 compositions after that date.

2 This is clearly a situation where the Plaintiffs should be  
3 awarded damages well in excess of the statutory minimum.

4 **C. Attorney's Fees and Costs**

5 The Copyright Act expressly provides that the "court may also  
6 award a reasonable attorney's fee to the prevailing party." 17  
7 U.S.C. Sec. 505. Because it is consistent with the purpose of the  
8 Copyright Act, courts routinely award the reasonable fees incurred  
9 by a Plaintiff asserting its rights. See Triple L Vending, Inc.,  
10 5 U.S.P.Q. 2d. at 1349-52; Broadcast Music, Inc. v. Fox Amusement  
11 Co., 551 F. Supp. 104 (N.D. Ill. 1982); Milene Music, Inc. 551 F.  
12 Supp. at 1297.

13 In the present case, the Defendants have intentionally  
14 ignored their obligation under the Copyright Act and have forced  
15 Plaintiffs to engage in litigation to enforce their rights.  
16 Accordingly, Plaintiffs should be awarded full attorney's fees.

17 The Copyright Act expressly provides that the court "in its  
18 discretion may allow the recovery of full costs by or against any  
19 party . . ." 17 U.S.C. Sec. 505. Under this provision, the courts  
20 have allowed full recovery by the prevailing party of its  
21 reasonable costs. See Milene Music, Inc. 551 F. Supp. at 1297.  
22 There are no factors which would militate against an award of the  
23 Plaintiffs' costs in the present case. Such an award is  
24 particularly appropriate in light of the Defendants' deliberate  
25 misconduct and the statutory purpose of encouraging private  
26

1 enforcement of the Copyright Act. The Affidavit of Michael D.  
2 Knox setting forth the attorney's fees and costs billed to  
3 Plaintiffs in this case accompanies this Motion as Exhibit D.

4 **VI. CONCLUSION**

5 For all of the foregoing reasons, Plaintiffs request that the  
6 Court:

- 7 (1) Enter a Summary Judgment in its favor against each  
8 Defendant, jointly and severally;  
9 (2) Enter an order permanently enjoining Defendants from  
10 further acts of infringement;  
11 (3) Award Plaintiffs statutory damages for each of the  
12 twenty (20) acts of copyright infringement alleged in  
13 the Complaint in an amount not less than (\$2,000) for  
14 each act of infringement;  
15 (4) Award Plaintiffs their full costs;  
16 (5) Award Plaintiffs their reasonable attorney's fees; and  
17 (6) Grant such other and further relief as the Court deems  
18 appropriate.

19 DATED this 27th day of April, 2007

20 LIONEL SAWYER & COLLINS

21  
22 By:                     /s/ Michael D. Knox  
23 Leslie Bryan Hart, Esq.  
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